Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
GTE Telephone Operating Companies	)	CC Docket No. 98-79
GTOC FCC Tariff No. 1	)	
GTOC Transmittal No. 1148	)	

MOTION TO STRIKE OR, IN THE ALTERNATIVE, FOR PERMISSION TO EXCEED PAGE LIMITS

Pursuant to 47 CFR §§ 1.106(f) and 1.3, the Ameritech Operating Companies (Ameritech) respectfully move that the Commission either: (1) strike all challenges to the Memorandum Opinion and Order in the above-captioned proceeding that were raised for the first time in comments, rather than in timely petitions for reconsideration, or (2) permit Ameritech to exceed the ten-page limitation set forth in 47 CFR § 1.106(h), if that limit applies in this proceeding, which is not clear. For the reasons set forth below, there is good cause to grant this request.

The Commission's rules require that petitions for reconsideration of any final order by the Commission must be filed within 30 days from the date of public notice of the final Commission action.[1] On November 30, 1998, two parties sought reconsideration of this *Order.* Pursuant to Public Notice, the Commission invited comments and replies on these petitions. Although section 1.106 of the Commission's rules, which applies to reconsideration requests in non-rulemaking proceedings permits only "oppositions," a number of parties filed comments

[1] 47 CFR § 1.106(f) and 1.429(d).

supporting the two reconsideration petitions. Moreover, instead of limiting themselves to the issues raised in these two petitions, these parties raised a host of new challenges to the *Order* in their comments. These include, to name but a few examples, challenges alleging:

- traditional jurisdictional tools should not apply to Internet access services because Internet services are provided via packet switched transmissions and/or because users may communicate with multiple sites during a single Internet session;
- telecommunications changes form, if not content, at an Internet service provider's switch;
- the Commission improperly failed to consider arguments that Internet access is not exchange access service.

These new arguments (along with the others not detailed above) should have been raised in a timely filed petition for reconsideration, not during the comment cycle in this proceeding. They are, therefore, subject to dismissal.

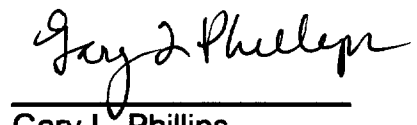
If, however, the Commission chooses not to strike these new arguments from the record, it should waive any page limits that would otherwise apply to Ameritech's reply. Had these new arguments been raised in properly filed reconsideration petitions, Ameritech could have addressed them in its Opposition, which, if 47 CFR §1.106(g) applies, was subject to a 25-page limitation. If they are not stricken from the record, Ameritech must be given adequate opportunity to respond to them.

Ameritech is not sure whether the procedures specified in section 1.106 of the Commission's rules, including the ten-page limit set forth in section 1.106(h), applies in this proceeding. That provision, by its terms, contemplates procedures

that may have been superseded by the public notice in this proceeding. For example, as noted, it contemplates Oppositions to a petition for reconsideration, not supporting comments.

To the extent the page limits in section 1.106 do apply, however, Ameritech asks that they be waived if the Commission does not strike from the record all new arguments included in supporting comments.

Respectfully Submitted,



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January 19, 1999

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AMERITECH REPLY TO COMMENTS ON PETITIONS FOR RECONSIDERATION

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TABLE OF CONTENTS

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AMERITECH REPLY TO COMMENTS ON PETITIONS FOR RECONSIDERATION

I. INTRODUCTION AND SUMMARY

Pursuant to the Commission's Public Notice of December 4, 1998, the Ameritech Operating Companies (Ameritech) respectfully submit this reply to comments on petitions for reconsideration of the Commission's Memorandum Opinion and Order (the *Order)* in the above-captioned proceeding.[1] In that Order, the Commission held that an "ADSL" access offering by GTE, "which permits Internet Service Providers (ISPs) to provide their end user customers with high speed access to the Internet is an interstate service and is properly tariffed at the federal level.[2]

On November 30, 1998, MCI WorldCom and the National Association of Regulatory Utlility Commissioners (NARUC) filed petitions for reconsideration of this decision. Although they do not seek reconsideration of the Commission's conclusion that GTE's ADSL service is properly tariffed at the federal level, they

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1 *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order,* CC Docket No. 98-79, FCC 98-292, released Oct. 30, 1998.

2 *Id.* at para. 1.

challenge the *Order's* analytical framework, claiming that the Commission based its decision on faulty reasoning. They take issue, in particular, with the Commission's conclusion that "the communications at issue here do not terminate at the ISP's local server ... but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end users."[3] MCI WorldCom claims that this conclusion is inconsistent with the Commission's finding in the *Universal Service Report* that ISPs are information service providers, not telecommunications service providers,[4] while NARUC questions "the inappropriate, or at least premature, extension of "end-to-end" analysis from ... a case where the "end-to-end communications ended and terminated on the public switched network – to apply it to a case requiring the FCC to go behind an enhanced service provider's/end user's interconnection point."[5]

In addition to challenging the Commission's end-to-end analysis of Internet traffic, MCI WorldCom and NARUC both raise other issues. MCI WorldCom seeks reconsideration of the Commission's finding that more than ten percent of Internet traffic is destined for websites in other states or other countries. It claims that, while this might be true for some users, it might not be true for others. NARUC requests clarification that states may require intrastate tariffs for xDSL services designed to connect end-users to ISPs.[6]

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3 *See e.g.* MCI WorldCom Petition, *citing id.* at para. 19.

4 *Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501 (1998).

5 NARUC Petition at 8.

6 NARUC also raised certain separations issues on which Ameritech takes no position at this time.

Ameritech and other incumbent local exchange carriers opposed these petitions. They noted the Commission's conclusion that Internet traffic does not terminate at the ISP server was based on at least fifty years of precedent, pursuant to which the boundaries of a communication are defined on an end-to-end basis, without regard to intermediate switching points. They also explained that MCI WorldCom misconceives the ten percent rule, and that shared jurisdiction would be contrary to law and sound public policy.

A number of competitive local exchange carriers (CLECs), on the other hand, and a few state commissions, support one or both requests. Many of these parties echo MCI WorldCom's claim that the Commission's jurisdictional analysis was inconsistent with its classification of ISPs as information service providers. Some also endorse its claim that the Commission did not adequately demonstrate that at least ten percent of all Internet traffic is interstate. Three state commissions support dual tariffing of xDSL Internet access services. On the other hand, only California supports NARUC's contention that end-to-end jurisdictional principles apply only to traffic on the public switched network.

Some parties challenge the *Order* on grounds not raised in either petition for reconsideration. For example, RCN faults the Commission for failing to address its claim that ADSL service is not "exchange access" service. California argues that Internet services are not provided via telecommunications. Washington claims that telecommunications ends at the ISP switch because there is a change in the form or content of information transmitted by the end

user at that point. RCN and TRA argue that traditional jurisdictional tools should not have been used at all in analyzing Internet traffic.

As shown below and in Ameritech's Opposition, these arguments are meritless. For example, in arguing that the Commission's decision is inconsistent with the *Universal Service Report*, CLECs make a compelling case that ISPs, as information service providers, are not, for the most part, deemed to be providers of telecommunications services.[7] What they fail to explain, however, is how this classification leads to the conclusion that telecommunications terminates at the ISP server. Their theory is that information services and telecommunications services are mutually exclusive, so telecommunications must necessarily cease when information services begin. Yet they effectively concede that telecommunications does not terminate at the ISP server because they acknowledge, as they must, that ISPs use telecommunications to connect their customers to various sites on the Internet.

Nor are the other grounds on which they challenge the *Order* any more compelling. Rather, the variety of half-baked theories they offer is testament itself that they are merely grasping at straws so that they may continue collecting mammoth reciprocal compensation subsidies to which they are not entitled. Indeed, they do not even attempt to mask this agenda, brazenly suggesting that

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[7] The Commission has recognized, however, that IP telephony may be deemed a telecommunications service. The Commission has also acknowledged that, to the extent an ISP provides raw transmission capacity to itself that is used to connect its customers to the Internet, that ISP may be deemed a telecommunications service provider. *Universal Service Report* at para. 69.

the Commission's decision might have "unintended consequences" and faulting Ameritech for having the nerve to quote this decision in court briefs.

The "unintended consequence" to which these CLECs refer, of course, is the long-awaited clarification by this Commission of jurisdictional principles governing Internet traffic.[8] By urging the Commission to retract the analysis set forth in the *Order*, CLECs seek nothing more than to breathe life into the now-discredited theories they have been peddling to state commissions and courts. The Commission should reject this invitation to conspire with CLECs in "hiding the law." It is travesty enough that CLECs have thus far been able to prevail in their insistence that Internet traffic is local traffic that terminates at the ISP server. The Commission should not compound the injustice by withdrawing its clarification in favor of a more limited decision or, worse yet, trampling decades of jurisprudence by accepting the CLECs' arguments in this proceeding.

II. ARGUMENT

A. The Status of ISPs as Information Service Providers is Irrelevant Because Information Services Incorporate a Telecommunications Component.

The principal argument raised by commenters is that the Commission's jurisdictional analysis is inconsistent with its determination in the *Universal Service Report* that ISPs are information service providers, not telecommunications service providers. Commenters voicing this argument rely, in particular, on the Commission's holding in the *Universal Service Report* that

[8] In reality, this clarification should not have been necessary, because as the *Order* makes clear, the governing principles have been consistently applied and are well settled.

telecommunications services and information services are mutually exclusive regulatory categories.[9] They claim that this holding necessarily means that "when an information service begins, the telecommunications aspect of that service must have concluded." Accordingly, they argue, the Commission erred in analyzing "ISP traffic as a continuous transmission from the end user to a distant Internet site."

The Commission rejected this argument in the *Order*, holding

> [a]lthough ... ISPs do not appear to offer "telecommunications service," and thus are not "telecommunications carriers" that must contribute to the Universal Service Fund, [the Commission has] never found that "telecommunications" ends where 'enhanced' information service begins. To the contrary, in the context of open network architecture (ONA) elements, the Commission stated that "an otherwise interstate basic service ... does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II."[10]

According to some CLECs, the Commission misapplied this statement from the *ONA Order*. They claim that the *ONA Order* addresses the status of a service offered by a common carrier, not an information service provider.

These arguments are hopelessly twisted. In concluding that telecommunications services and information services are mutually exclusive

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[9] In a vain effort to strengthen their argument, CLECs recast this holding in terms that are intended to suggest that the ruling was broader than it actually was. For example, some CLECs characterize the *Universal Service Report* as holding that telecommunications and information services are mutually exclusive "for regulatory purposes" – a re-phrasing that is meant to suggest that a telecommunications service and an information service cannot co-exist in any regulatory context. *See* CTSI Comments at 3-4; KMC Comments at 13. Some CLECs characterize the *Universal Service Report* as holding that the telecommunications component of an information service has "no legal status." *See* Logix Comments at 3; KMC Comments at 14.

[10] *Order* at para. 20, *quoting Filing and Review of Open Network Architecture Plans,* 4 FCC Rcd 1 (1988) at para. 274 (*ONA Order).*

regulatory categories, the Commission held only that an information service is not deemed a telecommunications service, despite the telecommunications component that, by definition, underlies it. In holding that information services are not themselves telecommunications services, the Commission in no way suggested that the telecommunications service underlying an information service is deemed not to exist at all. To the contrary, despite holding that ISPs do not generally provide telecommunications services, the Commission expressly recognized that they use telecommunications to transmit information between their customers and remote Internet web sites. Underscoring the Commission's recognition of this use as a discrete and cognizable service, the Commission noted that the providers of these telecommunications services would be required to contribute to universal service support mechanisms.[11] Obviously, if telecommunications and information services were "mutually exclusive" for all regulatory purposes, as CLECs contend, the telecommunications services underlying information services would not to subject to universal service funding requirements.

As seen in this light, the CLEC argument boils down to the facile notion that telecommunications necessarily terminates at the ISP server simply because the ISP itself is not the provider of the subsequent transmission services. This is a claim Ameritech addressed squarely in its Opposition. As Ameritech explained,

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[11] *See e.g. Universal Service Report* at para. 66: " Internet service providers themselves provide information services, not telecommunications (and hence do not contribute to universal service mechanisms). But to the extent that any of their underlying inputs constitutes interstate telecommunications, we have authority under the 1996 Act to require that the providers of those inputs contribute to federal universal service mechanisms." *See also id.* at paras. 67-72.

it makes no difference whether the ISP or some other entity – namely the telecommunications carrier chosen by the ISP for the transmission component of its information service – carries telecommunications from the ISP to its ultimate Internet destination. If the traffic, in fact, leaves the ISP's server, as does Internet traffic, that traffic does not "terminate" at the ISP's local server. Rather, that server simply represents an intermediate switching point through which telecommunications transmitted between subscribers and the Internet pass.[12]

In this respect, the Commission's reliance on the *ONA Order* was correct. The Commission's conclusion that Internet traffic must be analyzed "as a continuous transmission from the end user to a distant Internet site" was not premised on the notion that ISPs themselves are telecommunications carriers. Rather, it was based on the Commission's recognition that some entity – which may be the ISP, but need not be – transmits Internet traffic originated by the ISP's customers from the ISP server to various destinations on the Internet.

Ironically, while CLECs criticize the Commission's reliance on the *ONA Order*, that order is devastating to their claim. Like the *Universal Service* Report, it squarely rejects the notion that, as CLECs put it, "telecommunications and information services are mutually exclusive for regulatory purposes. It also makes clear that the boundaries of an information service, like any other service, are determined on an end-to-end basis:

> Enhanced services by definition are services "offered over common carrier transmission facilities." Since the Computer II regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a

[12] Ameritech Opposition at 5-6.

> basic service neither changes the nature of the underlying basic service when offered by a common carrier not alters the carrier's tariffing obligations, whether federal or state, with respect to that service. Computer III does not change this principle. Indeed, we have explicitly held that "the basic services involved in such (CEI/ONA) offerings are to be tariffed in the appropriate federal or state jurisdiction." Thus, when an enhanced service is interstate (that is, when it involves communications or transmissions between points in different states on an end-to-end basis), the underlying basic services are subject to Title II regulation.[13]

The *ONA Order* makes an additional point that Ameritech has been emphasizing throughout this proceeding: that the two-call theory advanced by CLECs is contrary to basic jurisdictional tenets. As the Commission stated: "the courts have construed our jurisdiction as applying to all 'services' and 'facilities' used at any point in completing an interstate telephone call. Indeed, we would be incapable of carrying out our statutory objectives if we have no authority over any facility that carries interstate calls but is physically intrastate."[14]

CLECs seek to escape this pitfall by asking the Commission to rule that a connection to an ISP is part of an interstate communication by wire, that consists of a intrastate telecommunications component (one that terminates at the ISP switch) and an interstate information service component that follows. Ameritech appreciates that CLECs have, at long last, recognized that Internet communications do not terminate at the ISP server. Their claim, however, that telecommunications can be distinguished from communications for jurisdictional purposes is nothing but a shell game. As noted above, telecommunications does

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13 *ONA Order* at para. 274.

14 *Id.* at para. 273.

not end when an information service begins for the simple reason that information services are, by definition, provided via telecommunications. Indeed, it is on this basis that the Commission was able to find in the *Universal Service Report* that classifying ISPs as information service providers would not have a negative impact on universal service funding. To accept the CLEC argument is to jeopardize that funding. It is an argument that is not only wrong, but contrary to public policy.

B. The Commission Did Not Err in Applying The Ten-Percent Rule

California, Hyperion, and KMC challenge the Commission's conclusion in paragraph 26 of the *Order* that "more than a *de minimis* amount of Internet traffic is destined for websites in other states or other countries, even though it may not be possible to ascertain the destination of any particular transmission." They argue that this conclusion was based only on "unsupported assumptions and banalities about the Internet."[15]

These parties ignore that the Commission broke no new ground in holding that more than a *de minimis* amount of Internet traffic is interstate. In the *Universal Service Report*, it concluded that Internet services are provided via interstate telecommunications services, the providers of which must contribute to the Universal Service Fund.[16] This finding was consistent with both the statutory definition of "Internet" (an "international computer network")[17] and the United

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15 KMC Comments at 12. *See also* California Comments at 4-5; Hyperion Comments at 2.

16 *See Universal Service Report* at para. 67.

17 47 U.S.C. 230(e)(1).

States Supreme Court's characterization of the Internet as a "medium of worldwide human communication."[18] If only a *de minimis* portion of Internet traffic crosses state lines, these characterizations would be misconceived.

Moreover, the suggestion of these parties that the Commission bears the burden of proving that more than ten percent of Internet traffic is interstate is fallacious. Jurisdiction is not presumed to lie with the states absent FCC proof to the contrary. Indeed, demands for proof are particularly disingenuous since, as these commenters are aware, Internet traffic cannot be jurisdictionally tracked.

In its Direct Case, GTE nevertheless provided compelling evidence that the large majority of Internet communications cross state or even national lines. No party has refuted this evidence.[19] The Commission was entirely reasonable in concluding, based on the record, as well as common sense, that more than a *de minimis* amount of Internet traffic crosses state lines.

C. The Commission Should Not Permit Dual Tariffing of xDSL Services Designed to Connect Users to ISPs.

California, Minnesota, and Washington support NARUC's request that the Commission clarify alleged "off-the-record" assurances by Commission staff that states may continue to require intrastate tariffs for xDSL services that connect

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[18] *ACLU v. Reno,* 117 S. Ct. 2329, 2334 (1997).

[19] The suggestion by KMC that "it is probable, or at least possible" that less than ten percent of Internet traffic would be jurisdictionally interstate due to "caching and mirroring of web sites on local services is absurd. As even KMC concedes, web browsing (the only application to which caching and mirroring is relevant) is just one of many Internet services. It is not even the most widely used service; the most widely used service is electronic mail. Moreover, mirroring is still generally in its nascent stages, and KMC's bald assertion that most ISPs cache the most frequently contacted servers is false. The vast majority of ISPs in this country do not engage in caching. Moreover, the most popular web sites are not necessarily susceptible to caching. Many of these sites provide up-to-the minute information (stock quotes, sports scores, breaking news, weather, etc.) that cannot be cached.

end-users to ISPs. California states: "NARUC's request is consistent with the position of California and twenty-three other states that such connections are generally local, and hence subject to tariffing by the state."[20] The Commission, however, rejected arguments that such connections are generally local. Instead, applying the mixed use facilities rule (*i.e.,* the ten percent test), it concluded that they are exclusively interstate. California's bald assertion that it disagrees with this decision is hardly a basis for ignoring that decision.

Washington claims that the Commission implicitly authorized dual tariffing of xDSL services because it did not preempt intrastate tariffing requirements. This argument misconceives the *Order,* and the mixed use facilities rule, in particular. As Ameritech explained in its Opposition, the whole point of that rule is to assign exclusive jurisdiction over mixed use special access traffic to either the interstate or intrastate jurisdiction. By assigning exclusive jurisdiction to either the FCC or the states, the rule obviates any need for preemption.

Washington, joined by Minnesota, also argues that state commissions are in the best position to gather information concerning the unique competitive environment in their states and to take any necessary actions to promote competition. They base this argument on their contention that small, local ISPs are more likely to inform local regulators than federal regulators of unfair and illegal competitive practices. This is hardly grounds for a *sua sponte* waiver of the mixed use facilities rule. The FCC fields hundreds of informal complaints every week, not only from small businesses, but individual consumers. Small ISPs are

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[20] California Comments at 5.

no less able to avail themselves of these processes than are these other users of telecommunications services. Indeed, the Commission's informal complaint processes have been designed to make it possible for small businesses and individuals to obtain redress without hiring a lawyer, without following formal procedures, and without investing significant time and resources. Nor is there any reason why state commissions that receive complaints from small ISPs cannot provide informal assistance to those individuals, help them contact appropriate personnel at the FCC, or forward their complaints to the FCC.

While states thus fail to demonstrate that dual tariffing would offer significant benefits, they also ignore the significant costs of a dual regime. As Ameritech explained in its Opposition, dual tariffing would be inconsistent with countless decisions in which the Commission, the states, and the Joint Board have sought to prevent tariff shopping. It could also undermine the ability of the FCC to fulfill its mandate under section 706 of the Act. For these reasons, the Commission should reject requests that states be permitted to require intrastate tariffing of xDSL Internet access services.

D. Miscellaneous Additional Arguments

(1) The Commission has jurisdiction over all interstate access services, not just exchange access services, although xDSL Service is, in any event, an exchange access service.

RCN complains that the *Order* fails to address its claim that GTE's xDSL service is not an "exchange access" service. Although it is difficult to follow RCN's tortured logic, its complaint seems to be grounded in section 3(26) of the

Act, which defines local exchange carrier as "any person engaged in the provision of telephone exchange service or exchange access." According to RCN, as a consequence of this definition, any service provided by a LEC that is not exchange access must necessarily be a telephone exchange service. RCN argues that DSL service does not meet the definition of "exchange access" -- the origination or termination of "telephone toll services." Hence, it claims, it must be a telephone exchange service.

This argument is sheer foolishness. First, since the Commission does not generally have jurisdiction over telephone exchange services,[21] the necessary implication of this argument is that, in defining the term local exchange carrier, Congress curtailed the Commission's jurisdiction – effectively denying it jurisdiction over any service provided by a LEC that does not meet the definition of exchange access. But if Congress intended to reduce the Commission's jurisdiction, it would have revised the key jurisdictional provisions of the Act: sections 1 and 2. It did not do so; those provisions continue to confer upon the Commission jurisdiction over "all interstate and foreign communications," irrespective of whether those communications meet the definition of exchange access. The notion, then, that Congress implicitly redefined all access services

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[21] *See* 47 U.S.C. 153(47), which defines telephone exchange service as " (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." As noted in the *Universal Service Report*, the "comparable service" to which this definition refers is "the provision of alternative local loops for telecommunications services, separate from the public switched telephone network, in a manner "comparable" to the provision of local loops by a traditional local telephone exchange carrier." *Universal Service Report* at para. 54.

that are not exchange access as telephone exchange services – and did so without correspondingly broadening the definition of telephone exchange services – is untenable.

Second, the definition of local exchange carrier in section 3(26) does not purport to present an exhaustive list of services that a LEC might provide. For example, LECs may provide information services, cable television services, telemessaging services, interexchange intraLATA services, local and long-distance cellular services, and interexchange interLATA wireline services. Under RCN's theory, all of these services would be telephone exchange services because they do not meet the definition of exchange access services. Moreover, RCN ignores the fact that section 251(g) of the Act specifically refers to the provision of "information access" by local exchange carriers.

In any event, Internet access services do, in fact, meet the definition of "exchange access." Although Internet access may be used for the origination of an information service, it also may be used for the origination of IP telephony. IP telephony is a "telephone toll service" since it is telephony "between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[22]

RCN contends that no Internet-based service could possibly be a telephone toll service. It claims that "telephone toll service" is defined in terms that make no sense in the context of the Internet. One such term, it argues, is

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22 47 U.S.C. § 153(48).

the term "exchange area," which, it claims, "connotes jurisdictional or regulatory boundaries that are simply not present on the Internet."[23]

Ameritech is pleased that RCN believes there are no jurisdictional boundaries on the Internet, and it assumes that RCN would extend that reasoning to local access transport area (LATA) boundaries as well. The Commission, however, does not agree. It has held that Bell operating companies (BOCs) may not cross LATA boundaries in their provision of in-region Internet services, and it has rejected BOC requests to forbear from applying LATA constraints to advanced data services, including Internet transmission services.[24] For the same reasons that LATA boundaries are recognized in Internet transmissions, so, too, are exchange area boundaries. RCN's claim that Internet-based services could not possibly be telephone toll services, and that access to an ISP is consequently not exchange access, is wrong.

(2) Telecommunications does not terminate when it leaves the public switched network.

California argues that, because the Internet is distinct from the public switched network, any telecommunications transmitted by an end user necessarily terminates at the ISP server. It claims that the Commission so concluded in the *Universal Service Report*, maintaining that the Commission

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23 *Id.* at 4.

24 *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* 11 FCC Rcd 21905 (1996) at para. 127; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, released Aug. 7, 1998, at paras. 65-82 and 190-196.

there stated that "Internet service 'cannot accurately be characterized...as 'transmission, between or among points specified by the user.'"[25]

Ameritech addressed in its Opposition NARUC's argument that telecommunications terminates where the public switched network ends and will not repeat that argument in full here. Suffice it so say that the argument flies in the face of more than fifty years of precedent in which end-to-end principles have applied to all communications, including the telecommunications components of information services, local distribution facilities for over-the-air broadcasts, wireless services, communications requiring multiple dialing sequences, and communications that leave the public switched network.

As for California's allegations regarding the *Universal Service Order*, those allegations are based on a misquote. The Commission never held in the *Universal Service Report* that users do not specify the points to which their Internet communications should be directed. Rather, the sentence on which California purports to rely relates only to the establishment of "home pages." Specifically, the Commission stated: "[w]hen subscribers store files on Internet service provider computers to establish 'home pages' ...[t]he service cannot accurately be characterized ... as 'transmission, between or among points specified by the user; the proprietor of a Web page does not specify the points to which its files will be transmitted, because it does not know who will seek to

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[25] California Comments at 3.

download its files."[26] California's contention that ISPs do not use telecommunications – an argument that even the CLECs concede is wrong - should be rejected.

(3) ISPs do not change the form or content of information transmitted by users onto the Internet.

Washington maintains that telecommunications transmitted by a user to an ISP "is changed, at least in form, if not in content, when it passes through the ISP" and thereby terminates at the ISP server.[27] This is incorrect. The Communications Act defines telecommunications as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information *as sent and received.*"[28] While ISPs transform information received from end users into packets that conform with the TCP/IP protocol, they do not change the form or content of the information "*as sent and received.*" At the destination point, the packets are reassembled, and the information is *received* in the same format in which it was sent by the end user.[29] Thus, consistent with the Commission's longstanding view that protocol processing services in which there is no net protocol

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[26] *Universal Service Report* at para. 76. California asserts that the quoted passage can be found in paragraph 83 of the *Universal Service Report*. That is incorrect. The language that California misquotes is in paragraph 76.

[27] Washington Comments at 4. Washington does not explain itself, other than to cite its Opposition to GTE's Direct Case, in which it states that "the 'form' of the information is changed so that it is possible to route the message packets out to the web which is the Internet."

[28] 47 USC § 153(43).

[29] *See Internet Over Cable: Defining the Future in Terms of the Past,* Barbara Esbin, Associate Bureau Chief, Cable Service Bureau, OPP Working Paper No. 30, August 1998 at 17; *Digital Tornado: The Internet and Telecommunications Policy*, Kevin Werbach, Counsel for New Technology Policy, OPP Working Paper No. 29, March 1997.

conversion between or among end users are telecommunications services," the protocol processing function performed by an ISP does not mark the termination of telecommunications.[30] Rather, the telecommunications continues from the end user to its ultimate destination on the Internet.[31]

(4) The *Order* properly applied traditional jurisdictional tools.

Some CLECs argue that the Commission should not have applied traditional jurisdictional tools in analyzing GTE's ADSL service. They are wrong.

RCN and Hyperion argue that Internet traffic should not be analyzed on an end-to-end basis because Internet transmissions are provided via packet switching. RCN summarizes their position as follows:

> the only 'continuous transmission' that is present in utilizing the Internet is the local dial-up call between the end user and the

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30 *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* 11 FCC Rcd 21905 (1996) at para. 106. *See also Universal Service Report* at para. 50. The Commission has identified three categories of services in which there is no net conversion between or among end users: (1) protocol processing in connection with communications between an end-user and the network itself (*e.g.*, for initiation, routing, and termination of calls); (2) protocol processing in connection with the introduction of new basic network technology (which requires protocol conversion to maintain compatibility with existing customer premises equipment; and (3) protocol processing in connection with internetworking (conversions taking place within the carrier's network to facilitate provision of a basic network service that result in no net conversion to the end-user. *Id. See also Application of AT&T for Authority under Section 214 of the Communications Act, as amended, to Install and Operate Packet Switches at Specified Telephone Company Locations in the United States,* 94 FCC 2d 48, 55-57 (1983); *Independent Data Communications Manufacturer's Association, Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service is a Basic Service,* 10 FCC Rcd 13717 (Com. Car. Bur. 1995).

31 Washington also claims that an Internet transmission involves two distinct communications, separated in time. It argues that "even without a change in form or content of the information sent by the end-user, there is an interruption in the flow of the communications which distinguishes the one-call cases." Washington Comments at 4. This argument, as well, is contrary to law. For example, in *Teleconnect v. Bell Telephone Co. of Pa.,* 10 FCC Rcd 1626 (1995), *aff'd Southwetern Bell Telephone Co. v. FCC,* No. 95-1193 (D.C. Cir. June 27, 1997), the Commission rejected the argument that an 800 call used to connect to an interexchange carrier's switch was distinct from the call that was placed from that switch. The Commission has also held that access to a credit card switch is "an intermediate step in a single end-to-end communications" the boundaries of which define the jurisdictional nature of the whole." *Southwestern Bell Telephone Co.,* 3 FCC Rcd 2339, 2341 (1988).

> ISP. All other transmissions are brief, intermittent bursts of packetized information that take extremely little time to reach their destinations. No end-to-end connection is ever established between the ISP and the "distant Internet site" on the packet network. ... Quite simply, some other regulatory model than the "continuous transmission" that the Commission has implemented with respect to interstate circuit-switched telecommunications must be devised.[32]

This argument, that an end-to-end analysis can be used for circuit-switched communications, but not for packet switched communications, ignores settled law. For more than fifty years, it has been recognized that "the Communications Act contemplates the regulation of interstate wire communication from its inception to its completion."[33] It has also been recognized that jurisdictional classifications have nothing to do with the type or location of facilities that are used to transmit communications. Rather, as the Commission has observed, "both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications."[34] Thus, end-to-end jurisdictional principles have been applied, not only to wireline, circuit-switched telephony, but to other services, such as microwave and cable television distribution services, to name but two examples. RCN and Hyperion present no reason for deviating from this longstanding precedent. While they correctly point out that packet switched transmissions do not require a dedicated path, they do

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32 RCN Comments at 7-8. *See also* Hyperion Comments at n. 6.

33 *United States v. AT&T,* 57 F. Supp. 451, 453-55 (S.D. N.Y. 1944), *aff'd,* 325 U.S. 837 (1945).

34 *See, e.g., Teleconnect v. Bell Telephone Co. of Pa.,* 10 FCC Rcd 1626 (1995) at para. 12, *aff'd, Southwestern Bell Telephone Co. v. FCC,* No. 95-1193 (D.C. Cir. June 27, 1997).

not even purport to explain why a dedicated path is a prerequisite to an end-to-end jurisdictional analysis. The Commission has recognized that packet switched services are "pure transmission services" that "do[] no more than transport information of the user's choosing between or among user-specified points, without change in the form of content of the information as sent and received[.]"[35] How the information travels among the user-specified points is irrelevant to a jurisdictional analysis.

Of course, RCN itself concedes as much because it admits that "*on an end-to-end basis* from end user to whatever endpoints are accessed by that end user, ADSL ... services may constitute a part of 'interstate or foreign communication by wire."[36] If RCN truly believed that an end-to-end analysis should not be used for packetized transmissions, it would not have relied on such an analysis itself in concluding that ADSL service is jurisdictionally interstate.

TRA offers a different theory for why the Commission's jurisdictional analysis is "anachronistic." Noting that users may communicate with multiple databases in multiple locations during a single Internet session, it asserts that traditional tools, including end-to-end analyses and the mixed use facilities rule, are inapt. In lieu of applying

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35 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 98-188, release August 7, 1998 at para. 35.

36 RCN Comments at 4 (emphasis added).

these tools, it claims, the Commission should defer to states that have found Internet access to be jurisdictionally local.[37]

This transparently self-serving critique must be rejected. While it is, of course, true that Internet users may communicate with multiple databases during a single Internet session, that, in and of itself, does not de-legitimize the application of end-to-end jurisdictional principles that have been applied for well over fifty years. The Communications Act empowers the Commission to regulate "*all* interstate and foreign communications by wire or radio." Every interstate communication, at some point, traverses facilities that are physically intrastate. Typically, those facilities are local exchange facilities used for access service. In an Internet transmission, those facilities include, not only those used for access to the ISP, but any other physically intrastate facilities that are traversed during the Internet session, including facilities linking the ISP to an intrastate database. While that may make Internet communications different from many other communications, it does not invalidate end-to-end jurisdictional principles. Rather, it simply drives a conclusion that facilities used to contact intrastate web sites are jurisdictonally interstate,

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[37] TRA also claims that the various databases with which a user communicates during an Internet session "look more like 'intermediate points of switching' than they do like end points. It posits that if "the dispositive consideration is the 'continuous path of communications,' the end point of an Internet call would appear to be the server initially contacted by the end user to initiate his or her session ...[since that is] the last, or one of the last, screens that the end user will see as he or she terminates his or her session[.]" TRA Comments at 3-4. This is, of course, nonsense; as it ignores basic Internet technology. The databases with which an Internet user communicates are not intermediate switching points; it is the ISP, not these databases, that send packetized information from the user to subsequent sites with which the user communicates. And the fact that the user sees the ISP screen when it is finished communicating is no more relevant to a

consistent with the age-old rule that the Commission has jurisdiction over all facilities and services used *at any point* in completing an interstate telephone call.[38]

Nor is TRA correct in arguing that the mixed use facilities rule was intended to deal only with multiple point to point communications the jurisdictional character of each of which is clear. The Commission specifically declined to require traffic studies when it adopted the mixed use facilities rule, because it recognized that the jurisdictional character of each point to point communication provided over those lines could not easily be determined:

> As the Joint Board recognized, traffic on many special access lines cannot be measured at present without significant additional administrative efforts. In many cases, even the end user does not have precise information on traffic patterns, although such customers should have sufficient information ...for purposes of this rule, based on system design and functions. We do not expect special access customers to perform additional traffic studies for this purpose.[39]

In this regard, Internet access service is just one of many services to which the mixed use facilities rule applies in which reasonable guesses

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jurisdictional analysis than the fact that the user obtains a dial-tone from its local exchange carrier when it finishes making an interstate call and places his phone on-hook.

[38] *National Association of Regulatory Utility Commissioners v. FCC,* 746 F.2d 1492, 1498 (D.C. Cir. 1984). *See also id.* ("purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use.")

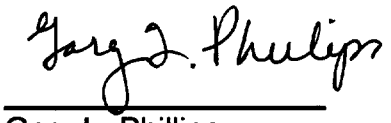
[39] *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board,* 4 FCC Rcd 5660 (released July 20, 1989 at para. 6, n. 7.

based on system design and function must be made. Nothing more has ever been required.

III. Conclusion

The Commission's conclusion in the *Order* that ADSL service is interstate and the reasoning underlying that conclusion were correct. The petitions for reconsideration of the *Order* should be rejected.

Respectfully Submitted,



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January 19, 1999

CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that copies of Ameritech's Motion to Strike or, in the Alternative, for Permission to Exceed Page Limits and of Ameritech's Reply to Petitions for Reconsideration has been served on the parties attached via first-class mail – postage prepaid, on this 19th day of January 1999.

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